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No. 75-450

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

DEAKE G. PORTER,
Petitioner,

v.

ROBERT NOSSEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

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ROBERT NOSSEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Deake G. Porter, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals and the order denying rehearing (App. A, *infra*, pp. 1a-7a) have not been reported. The district court did not prepare an opinion in conjunction with its order (App. B, *infra*, p. 8a). The district court's memorandum order denying rehearing is not reported (App. B, *infra*, pp. 9a-12a).

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1975 (App. A, *infra*, pp. 5a-6a). On April 24, 1975, an order was entered denying petitioner's request for rehearing (App. A, *infra*, p. 7a). On July 14, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 21, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court violated Rule 41(b) of the Federal Rules of Civil Procedure by dismissing an action with prejudice for failure to prosecute solely on the basis of its desire to expedite the case which had been pending for a year and plaintiff's inability to go to trial where the *pro se* plaintiff was diligently attempting to prepare for trial and the delay in the action had not harmed the defendants.

2. Whether the district court violated the right to counsel under the Due Process Clause of the Fifth Amendment and the right to trial by jury under the Seventh Amendment by requiring the plaintiff, who intended to obtain counsel, to select a jury without the aid of counsel.

STATEMENT

Petitioner, a college professor in economics, was dismissed in October 1970 from Bloomsburg State College in Bloomsburg, Pennsylvania, in the middle of his contract term. Prior to September 1965, petitioner had spent 15 years teaching economics at Georgia State, Yale, Hofstra, and Adelphi Universities. In September 1965, he was appointed Associate Professor of Economics at Bloomsburg State College. Between early 1969 and the time of his dismissal, petitioner participated in a number of controversial extracurricular activities, which in-

cluded advocating due process for students and faculty members in college-conducted proceedings and openly criticizing American involvement in the Vietnam war. In late 1969 and 1970, petitioner was strongly criticized for his activism by the President of the College, respondent Robert Nossen.

On January 31, 1973, petitioner filed suit in the District Court for the Middle District of Pennsylvania against respondent Nossen and others. Petitioner alleged, *inter alia*, that his dismissal from the College violated his rights under the First and Fourteenth Amendments in that it was in retaliation for his expression of views critical of the College and the United States and his right to due process of law in that, prior to his termination, he was provided neither a list of the charges against him nor an opportunity for a hearing. On February 6, 1973, the district court issued an order placing petitioner's action on the court's November 1973 trial docket and required all discovery to be completed by November 5, 1973. On March 9, 1973, respondents moved to stay the proceedings until the district court rendered a final judgment in the "virtually identical action" (App. B, *infra*, p. 11a) of Dr. Joseph Skehan, a colleague of petitioner at Bloomsburg State who had earlier brought suit challenging his October 1970 dismissal from the college.[1]

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[1] Dr. Skehan's action was before the same district court judge. On May 9, 1973, the district court held that Dr. Skehan's right to a pretermination hearing had been violated. However, the court refused to order that a hearing be provided Dr. Skehan and granted judgment in the amount of one dollar. *Skehan* v. *Board of Trustees of Bloomsburg State College*, 358 F. Supp. 430, 434-436. The Court of Appeals for the Third Circuit held that Dr. Skehan was entitled to a hearing on his October 1970 dismissal and that an award of back pay would be appropriate if on remand the college was found not to be immune to such an award. 501 F.2d 31, 38, 41-43, 45. However, the court of appeals held that Dr. Skehan's claims for damages and attorney fees against officials of the college were barred by sovereign immunity. 501 F.2d at 43-44. This Court granted Dr. Skehan's petition for a writ of certiorari on May 27, 1975, and re-

This motion was denied by the court on April 3, 1973. On April 26, 1973, respondent filed a motion to dismiss which was denied on July 9, 1973.

On October 12, 1973, petitioner requested leave of court to proceed *in forma pauperis* and *pro se* until such time as he could obtain the services of a new attorney. Petitioner had learned on October 4th that his attorney had failed to initiate any discovery in his case. Since, by the terms of the district court's order of February 6, 1973, discovery was to have been completed by November 5th, the attorney's failure to have initiated discovery by October 4th had precluded petitioner from obtaining material necessary for the prosecution of his action. Moreover, petitioner learned in early October that his counsel had been retained in a related matter by a member of the college faculty who was to be an adverse witness in petitioner's trial. As a result, petitioner requested his counsel to withdraw from the case and he filed a request for permission to proceed *pro se* until other counsel could be retained.

At a pre-trial conference on November 6, 1973, the district court permitted petitioner's counsel to withdraw from the case. The court and petitioner agreed that petitioner was not capable of handling the case by himself. The court, petitioner and the respondents expressed the view that petitioner should obtain counsel. Petitioner made clear that he did not want to conduct his trial *pro se* and he indicated that he intended to obtain other counsel. In light of the withdrawal of petitioner's attorney, the court transferred the case to its December 1973 docket and extended the final date for discovery until December 3, 1973.

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manded the case to the court of appeals for reconsideration of the issue of damages against the individual college officials. No. 74-558, October Term, 1974, —— U.S. ——, 95 S. Ct. 1986.

In the three and a half months following his motion to proceed *in forma pauperis* and *pro se*, petitioner made substantial efforts to prepare for trial, only to be blocked at practically every turn by respondents' strong opposition. On October 12th, petitioner filed a 15-page request for the admission of material facts by respondent Nossen. On November 23rd, respondent Nossen replied by refusing to respond to over half of the 62 statements contained in petitioner's request. On October 25th, petitioner filed a motion for permission to inspect numerous documents under control of James H. McCormack, the new President of Bloomsburg State College. On November 13th, respondents refused to produce many of the documents requested by petitioner. Six days later petitioner replied, objecting to respondents' refusal to permit inspection of all requested documents and petitioning the court to order full production. On November 20th, the court ordered respondents to make available some of the documents they had refused to produce and gave petitioner five days (November 21 to 26) to inspect these and the other documents respondents had agreed to produce. On October 29th, petitioner filed a request for the admission of material facts by James H. McCormack. On November 23rd, respondents refused to respond to this request on the ground that James H. McCormack was not a party to the suit. On November 27th, petitioner requested the chairman of the Economics Department at Bloomsburg State College to produce certain documents for his inspection. Two days later, respondents refused to produce the documents on the ground that the individual to whom petitioner's request was addressed was also not a party to the suit.

On December 6, 1973, petitioner filed a 23-page petition for a stay in the proceedings which described in detail how respondents had failed to make available for his inspection the documents which the court had ordered

to be produced in its order of November 20th. Petitioner sought a stay in the proceedings until respondents made the documents available and he had had an opportunity to file a motion to amend his complaint. On December 10th, the district court refused to stay the proceedings but continued petitioner's case until February 1974 and set a final pre-trial conference for February 4, 1974. The court also extended the period in which petitioner could inspect documents until January 31, 1974.

Petitioner thereafter continued his efforts to obtain information relevant to his trial. In late December he served two sets of interrogatories on respondents' attorney. One set, containing 45 interrogatories, was directed to the members of the Committee on Professional Affairs at Bloomsburg State College; the other set was directed to Robert Bunge, the Registrar of the college. Respondents opposed these interrogatories in a motion for a protective order, filed January 28, 1974, on the ground that none of the individuals to whom the interrogatories were addressed was a party to the suit. The court granted that motion on January 31, 1974, without considering petitioner's brief which was mailed that same day and received by the court on February 4th.

In late December 1973 and again in early January 1974, petitioner notified respondents' attorney that he believed it necessary to amend his complaint in light of respondents' expressed intent to present evidence concerning his conduct and performance at the college prior to his dismissal in October 1970. Throughout January, petitioner worked on the preparation of this amended complaint. On January 28th, petitioner filed a motion to amend his complaint, a copy of his proposed 43-page amended complaint, and an affidavit setting forth arguments in support of his motion. Two days later, on January 30th, the court denied petitioner's motion to amend, stating that "[t]o permit the proposed amend-

ment would require a further continuance[,] * * * would greatly complicate the case presently before the Court and any continuance granted would probably be of necessity of considerable duration in order to permit the proposed additional parties adequately to prepare and present their claims and defenses."

His motion to amend having been denied and his efforts at discovery successfully blocked, petitioner filed on February 4th a motion for a continuance of his trial and a brief in support thereof. Petitioner argued for a continuance on four grounds: first, on January 31st the teachers' union at Bloomsburg State College had voted to provide funds to enable him to retain an attorney who would need time to prepare for trial; second, respondents' opposition to his efforts at discovery had left him unprepared to conduct a trial; third, he lacked adequate time and funds to locate and prepare witnesses and to reproduce the large number of documents needed for trial; and fourth, he needed time to appeal the court's denial of his motion for leave to amend his complaint. During the pre-trial conference on February 4th, the district court denied petitioner's request for a continuance, even though respondents did not oppose it and all the parties admitted that they were not prepared for trial. Transcript of Hearing, February 4, 1974, pp. 6-9, 12, 18. The court's sole reason for denying petitioner's motion was that the case had already been continued twice and was the oldest case on its docket. *Id.* at 2, 7, 8. At this hearing, the court informed petitioner for the first time that he risked the dismissal of his action if he did not proceed to trial the next day. *Id.* at 13, 18.

On numerous occasions on February 4th and 5th, petitioner informed the court that he intended to obtain an attorney to assist in the conduct of his trial. Transcript of Hearing, February 4, 1974, p. 5; Transcript of Hearing (in chambers), February 5, 1974, pp. 2, 3. However

on February 5th, the court insisted that petitioner draw a jury, although it did indicate a willingness to delay the trial for approximately two weeks once petitioner had drawn the jury. Transcript of Hearing (in chambers), February 5, 1974, p. 8; Transcript of Hearing (in court), February 5, 1974, pp. 3, 9. After stressing his unpreparedness for trial, petitioner requested the court to dismiss his action without prejudice. Transcript of Hearing (in court), February 5, 1974, p. 2. Respondents indicated a willingness to discuss that request, but the court refused to consider it. *Id.* at 5. Thereupon, petitioner stated he was not prepared to draw a jury and respondents moved that his action be dismissed with prejudice for failure to prosecute. *Id.* at 9, 10. Stating that the case was over a year old and had been continued twice before (*id.* at 10), the court granted respondents' motion (*id.* at 11, 16; App. B, *infra*, p. 8a).

Later in the day on February 5th, petitioner requested the court to reconsider its dismissal of his action. Petitioner informed the court that he was willing to accept its offer to grant a brief continuance of his trial in exchange for his proceeding with the selection of a jury. The court, however, declined to modify its order.

On February 15, 1974, petitioner moved for reconsideration of the court's order dismissing his action with prejudice. On April 15th, the district court denied the motion. (App. B, *infra*, pp. 9a-12a). On February 18, 1975, the Court of Appeals for the Third Circuit affirmed the district court's order (App. A, *infra*, pp. 1a-6a).

REASONS FOR GRANTING THE WRIT

We submit that a writ of certiorari should be granted on two issues:

1. In affirming the district court's order, the court of appeals held that a court may dismiss with prejudice the

civil rights action of a *pro se* litigant for failure to prosecute solely because of the length of time the action has been pending, without considering the party's conduct over the life of the action, the reasons for delay, the prejudice to other parties, or the less harsh sanctions available for imposition upon the litigant. That holding, we submit, conflicts with decisions of this Court and numerous courts of appeals concerning the authority of courts to dismiss actions with prejudice for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure.

In *Link* v. *Wabash R.R. Co.*, 370 U.S. 626 (1962), this Court described the purpose of the judiciary's authority to dismiss actions with prejudice for lack of prosecution. The Court stated that "[t]he power to invoke this sanction is necessary in order to prevent *undue delays* in the disposition of pending cases and to avoid congestion in the calendars of the District Courts" (*id.* at 629-630) and to enable courts "to clear their calendars of cases that have remained *dormant* because of the *inaction or dilatoriness* of the parties seeking relief" (*id.* at 630) (emphasis added). Thus, the authority to impose the sanction of dismissal with prejudice is to be exercised only in instances where a litigant's conduct has caused undue delay in the progress of his action.

Many courts of appeals have followed this rule in interpreting the authority of courts to dismiss actions with prejudice under Rule 41(b). They have held that trial courts must review the conduct of the non-prosecuting plaintiff in order to determine whether there is a clear record of delay or contumacious conduct by the plaintiff which warrants the harsh sanction of dismissal with prejudice. *E.g.*, *Richman* v. *General Motors Corp.*, 437 F.2d 196, 199 (C.A. 2, 1971); *Reizakis* v. *Loy*, 490 F.2d 1132, 1135 (C.A. 4, 1974); *Durham* v. *East Coast Railway Co.*, 385 F.2d 366, 368 (C.A. 5, 1967). Moreover,

several circuits have held that, before an action can be dismissed under Rule 41(b), the district courts must consider the availability of less harsh sanctions for imposition upon the derelict litigant or attorney. *Richman* v. *General Motors Corp.*, *supra*, 437 F.2d at 199; *Reizakis* v. *Loy*, *supra*, 490 F.2d at 1135; *Canada* v. *Matthews*, 449 F.2d 253, 255 (C.A. 5, 1971); *Brown* v. *Thompson*, 430 F.2d 1214, 1216 (C.A. 5, 1970); *Industrial Building Materials, Inc.* v. *Interchemical Corp.*, 437 F.2d 1336, 1339 (C.A. 9, 1970). Similarly, several circuits have concluded that, in determining whether to dismiss with prejudice for lack of prosecution, the district courts must consider the prejudice that has been imposed upon defendants by the plaintiff's delay in prosecuting the action. *Reizakis* v. *Loy*, *supra*, 490 F.2d at 1135; *Durham* v. *Florida East Coast Railway Co.*, *supra*, 385 F.2d at 368-369; see *Richman* v. *General Motors Corp.*, *supra*, 437 F.2d at 199; *Vina* v. *Hub Electric Co.*, 480 F.2d 1139, 1141 (C.A. 7, 1973). The courts have also made clear that a trial court has a special obligation to protect the rights of litigants proceeding *pro se*. See, *e.g.*, *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972); *Alley* v. *Dodge*, 501 F.2d 880, 883-886 (C.A.D.C. 1974); *Johnson* v. *United States*, 405 F.2d 1072, 1074 (C.A.D.C. 1968); *Stirling* v. *Chemical Bank*, 511 F.2d 1030, 1031-1032 (C.A. 2, 1975); *Vina* v. *Hub Electric Co.*, *supra*, 480 F.2d at 1141.

In the instant case, the court of appeals affirmed the district court's dismissal of the action with prejudice. The district court dismissed solely on the basis that the case had been continued twice and was the oldest case on its docket. The court gave no consideration to the petitioner's diligence or lack of it in prosecuting his action, the prejudice, if any, incurred by respondents as a result of the length of time petitioner's action had been pending, or the lesser sanctions which might have been imposed upon petitioner. Indeed, if the district court had considered these factors, it clearly could not have dis-

missed with prejudice. Petitioner, although perhaps ineffectual because of his lack of legal training, had obviously been trying with great diligence to prepare for trial. Respondents pointed to no prejudice to themselves caused by the delay; instead, they did not oppose a continuance and were themselves not ready for trial. Less harsh sanctions, such as a reprimand or modest fine, were available to the court to impose upon petitioner.

The court of appeals, in affirming the district court's order, thereby held that the district court could properly dismiss the action with prejudice solely on the basis of concern for judicial economy and the effective management of court dockets. Thus, the decision of the court below directly conflicts with this court's decision in *Link* v. *Wabash R.R. Co.* and decisions in several other circuits.

Dismissal with prejudice under Rule 41(b) is of course a final adjudication of the litigant's claims. Thus, it directly affects the litigant's fundamental right to a hearing on the merits. See *Societe International Pour Participations Industrielles et Commerciales* v. *Rogers*, 357 U.S. 197, 209 (1958); *Hovey* v. *Elliott*, 167 U.S. 409, 411-415 (1896). This issue as to the principles to be applied by courts when dismissing actions with prejudice under Rule 41(b) is therefore of major importance to the functioning of the federal judicial system.

2. In affirming the district court's order, the court of appeals held that, for the purpose of expediting an action, a court may require a litigant to waive his right to the assistance of counsel in the selection of a jury in order to avoid the dismissal of his action with prejudice. The decision therefore raises an important question regarding the balance to be struck between the judiciary's authority to control calendars and administer cases and the individual's right to counsel in all phases of his civil trial and his right to trial by jury.

The Due Process Clause of the Fifth Amendment provides a right to counsel to civil litigants. *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). This right does not include a right to appointment of counsel in instances where a litigant's poverty or other circumstances prevent his retaining an attorney. *McGaughy* v. *Gardner*, 296 F. Supp. 33, 36 (E.D. La. 1967); see *Rex Investigative and Patrol Agency, Inc.* v. *Collura*, 329 F. Supp. 696, 699 (E.D.N.Y. 1971). However, it does include the right to have retained counsel present in all phases of a civil trial, including the selection of a jury. See *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919); *Arrington* v. *Robinson*, 114 F.2d 821, 823 (C.A. 3, 1940). This Court has often noted the importance of jury selection and the exercise of peremptory and other challenges in criminal cases. See, *e.g.*, *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965); *Pointer* v. *United States*, 151 U.S. 396, 408 (1894). We submit that these rights are of similar importance in civil cases.

On the other hand, judicial limitations on the right to counsel have been sustained by this Court. In *Avery* v. *Alabama*, 308 U.S. 444, 450-451 (1940), this Court held that a criminal defendant's right to counsel was not violated by the trial court's refusal to grant a continuance of his trial where counsel, who had been appointed only three days prior to the date set for trial, claimed inadequate opportunity to prepare for the defense. Similarly, in *Ungar* v. *Sarafite*, 376 U.S. 575, 588-591 (1964), this Court found no denial of the right to counsel in a trial court's refusal to continue a hearing on a contempt charge where the continuance had been requested to allow the defendant's recently-retained attorney an opportunity to prepare. However, in *Avery* v. *Alabama*, *supra*, this Court found that the defendant had been represented by attorneys in the trial court and had received the "assistance of zealous and earnest counsel." 308 U.S. at 450.

The court also found that "the examination and preparation of [defendant's] case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle * * *." 308 U.S. at 452. In *Ungar* v. *Sarafite*, *supra*, this Court held that the time permitted the defendant, an attorney, to obtain another attorney and prepare a defense had not been inadequate. 376 U.S. at 550. The Court specifically noted that, since the hearing had been scheduled less than three weeks after the defendant's allegedly contemptuous conduct, "the evidence was fresh, the witnesses and evidence readily available, the issues limited and clear-cut and the charge revolving about one statement made by Ungar during a recently completed trial." *Ibid.* Moreover, the Court observed that the defendant was himself a lawyer familiar with the trial court's practice of refusing to grant continuances. *Ibid.*

The circumstances in the instant case differ substantially from those in *Avery* v. *Alabama*, *supra*, and *Ungar* v. *Sarafite*, *supra*. Unlike the defendant in *Avery*, at the time he declined to draw a jury, petitioner did not have the benefit of an attorney, let alone an attorney who had had adequate opportunity to prepare his case. Unlike the defendant in *Ungar*, petitioner is not an attorney and is not familiar in any sense with the techniques and strategies of jury selection.

We therefore submit that the court's order requiring petitioner to draw a jury without the aid of an attorney, based only on its desire to expedite the case, impermissibly infringed upon petitioner's right to counsel under the Due Process Clause of the Fifth Amendment.

Moreover, this Court has consistently held that an individual's right to a governmental entitlement may not be conditioned upon his willingness to restrict the exercise of constitutional rights. *E.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 404-406 (1963); *Speiser* v. *Randall*, 357

U.S. 513, 518-519 (1958). In the instant case, in order to expedite petitioner's case, the district court conditioned petitioner's right to a hearing on the merits of his claims and to trial by jury upon his willingness to draw a jury without the assistance of counsel. In so doing, we submit, the court impermissibly infringed upon petitioner's right to counsel under the Due Process Clause of the Fifth Amendment and to trial by jury under the Seventh Amendment of the merits of his claims.

3. The fundamental issue in this case concerns the extent to which the district courts, in order to reduce their dockets, can take actions which are inconsistent with the interests of justice in the individual cases before them. In recent years, the courts have been striving to reduce, or at least to reduce the increase in, their dockets by expediting the disposition of cases. See Annual Report on the State of the Judiciary, Remarks of the Chief Justice to the American Bar Association, February 23, 1975, p. 9; Statement of the Chief Justice on the "Thirty Percent Increase in Case Handling per Federal Judgeship," October 1973, pp. 1-3; Report on the Federal Judicial Branch, Remarks of the Chief Justice to the American Bar Association, August 6, 1973, pp. 4, 13. Important as this policy is, it can and, as in this case, often does come into direct conflict with the rights of litigants to reasonable consideration of their claims.

We submit that this Court should clearly set forth, for the guidance of the lower courts, the principle that the desire to reduce court dockets and expedite cases cannot be permitted to take precedence over the fair adjudication of litigation. We also submit that this Court should establish guidelines to be followed by the lower courts when determining whether to dismiss actions under Rule 41(b) for lack of prosecution. The courts of course exist to serve the parties and are not to consider expediency and the efficient dispatch of business over the

rights and needs of litigants. *Durham* v. *Florida East Coast Railway Co., supra*, 385 F.2d at 368; *Alamance Industries, Inc.* v. *Filene's*, 291 F.2d 142, 146 (C.A. 1, 1961). This principle has particular application when a party is proceeding *pro se*. We therefore submit that a writ of certiorari should issue to allow this Court to consider these basic issues concerning the administration of justice in the federal courts.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari to the Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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SEPTEMBER 1975

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1615

DEAKE G. PORTER,
Plaintiff-Appellant

v.

ROBERT NOSSEN, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 73-72)

Submitted Under Third Circuit Rule 12(6)
February 4, 1975

Before: ADAMS, ROSENN and WEIS, *Circuit Judges.*

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OPINION OF THE COURT

(Filed Feb. 18, 1975)

PER CURIAM:

Plaintiff Deake G. Porter has appealed from an order of the district court dismissing his case with prejudice for failure to proceed to trial on the scheduled date.

On January 31, 1973, plaintiff's attorney filed a complaint alleging that Mr. Porter had been wrongfully discharged from his position as associate professor of economics at Bloomsburg State College without proper notice and hearing. Shortly thereafter, the case was listed for trial in November, 1973.

On October 12, 1973, because plaintiff asserted a potential conflict of interest, his counsel withdrew from the case, leaving Porter to seek another lawyer and, in the interim, to conduct the action himself. After urging that he secure counsel as quickly as possible, the court granted plaintiff's motions to proceed in forma pauperis and *pro se*, as well as granting two continuances of the trial.

Finally, at the pretrial conference on February 4, 1974, plaintiff sought a third continuance. The judge denied the motion and ordered that he begin the selection of a jury. Plaintiff refused, but later telephoned the judge saying he would proceed. On the next day, however, he once again refused to draw a jury despite an offer by the district judge to shift the trial to the bottom of the current list, thus giving plaintiff an estimated additional two weeks to prepare his case. Thereafter, upon defendant's motion, the case was dismissed with prejudice. Ten days later, plaintiff moved for reconsideration, but this motion was denied.

In this instance, the action of the district court finds support in the Federal Rules and in the record. Fed. R. Civ. P. 41(b) provides that, for failure of a plaintiff to comply with "any order of court," upon a motion by defendant, the court may dismiss the case with prejudice.

It is clear from the record that the court extended every consideration possible both in the plaintiff's efforts to secure counsel and in the prosecution of his cause of action. Two continuances of a month each were granted which afforded sufficient time for preparation of the case and the retaining of an attorney. The court anticipated the problems of a *pro se* proceeding and made appropriate allowances. Moreover, the district judge urged on several occasions that plaintiff employ counsel not only to improve his chances of success but to simplify the trial as well.

It is apparent also that the plaintiff declined to follow the judge's instructions to prepare for trial and instead devoted much time to the preparation of a voluminous amended complaint. The district judge properly refused to accept this pleading at the late stage of the litigation when it was proffered since it changed the whole complexion of the case and would have unduly delayed the matter.

While the court makes allowances for *pro se* parties, it cannot permit them to ignore its rules or to flaunt its authority while parties represented by counsel are held to strict compliance. To assure fairness to all litigants and to promote smooth operation of the court, reasonably equal treatment should be afforded.

We find no abuse of discretion on the part of the district court, and its judgment will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1615

DEAK G. PORTER,

Appellant

vs.

ROBERT NOSSEN, WILLIAM E. BOOTH, FRANK D. CROOP, E. GUY BANGS, WILLIAMS A. LANK, EDGAR A. FENSTER-MACHER, GEORGE W. HEFFNER, BERNARD J. KELLEY, GERALD BEIERSCHINITT, Individually, and as members of the Board of Trustees of Bloomsburg State College, JOHN PITTENGER, CHARLES CARSON, and BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE

(D.C. Civil Action No. 73-72)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: ADAMS, ROSENN and WEIS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, entered February 5, 1974 and April 15,

1974, be, and the same are hereby affirmed. Costs taxed against appellant.

ATTEST:

/s/ [Illegible]
Clerk

February 18, 1975

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1615

DEAKE G. PORTER,
Plaintiff-Appellant
v.

ROBERT NOSSEN, et al.,
Defendants-Appellees.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Joseph Weis, Jr.
Judge

Dated: April 24, 1975

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 73-72

DEAKE G. PORTER,
Plaintiff

vs.

ROBERT NOSSEN, et al.,
Defendants

ORDER

February 5, 1974

Defendants' motion for dismissal of the action with prejudice is granted. This written order is confirmatory of the oral order made in open court this date.

/s/ Muir
MUIR
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 73-72

DEAKE G. PORTER,
Plaintiff

vs.

ROBERT NOSSEN, et al.,
Defendants

ORDER

April 15, 1974

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On February 5, 1974, this Court granted Defendants' motion to dismiss the action with prejudice. Before the Court is Plaintiff's motion for reconsideration of that dismissal order.

On January 31, 1973, Plaintiff filed this civil rights action against individual members of the Board of Trustees of Bloomsburg State College alleging, *inter alia*, that he was unconstitutionally dismissed from his position as Associate Professor of Economics at Bloomsburg State College. By Order dated February 6, 1973, the case was placed on the November, 1973 trial list, with juries to be drawn on November 20, 1973. Following denial of Defendants' motion to stay proceedings and motion to dismiss, an answer was filed on July 20, 1973. A dispute arose between Plaintiff and his attorney, and on November 6, 1973, the Court approved the attorney's application for withdrawal of his appearance. Plaintiff had been unable to obtain another attorney so, on November 7, 1973, the case was continued to the list of

cases set for trial beginning December 17, 1973. Plaintiff was urged by the Court to obtain counsel, but was apparently unable to obtain one, for he proceeded in the case *pro se*. On December 6, 1973, Plaintiff requested another continuance alleging Defendants' obstruction of the discovery process. On December 10, 1973, the Court continued the case to the trial list beginning February 5, 1974, and extended the discovery cut-off date until January 21, 1974. On January 30, 1974, approximately one week before trial, Plaintiff submitted a motion to file a 44-page amended complaint introducing several new causes of action and naming many new parties, both plaintiffs and defendants. The Court denied leave to file the amended complaint on January 30, 1974.

A pre-trial conference was held on February 4, 1974 at which Plaintiff filed a motion for a continuance. When this was denied, Plaintiff stated that he would not proceed with the case and would not draw his jury on the following day as scheduled. He was warned that such action would result in dismissal of the case. On the evening of February 4, 1974, Plaintiff telephoned the undersigned judge at his home and stated that he would proceed with the case and select a jury but that he needed some additional time. Plaintiff was informed that the Court would consider dropping the case to the bottom of the trial list which would result in a delay of perhaps several weeks before trial of the action, but that the Court first desired to hear Defendants' position on this suggestion. At a conference on February 5, 1974, Plaintiff once again changed his mind and stated that he would not proceed. He refused the Court's offer, consented to by Defendants, to drop the case to the bottom of the list. Plaintiff was informed that the Court would grant a motion to dismiss should Plaintiff fail to select a jury. When this case was called for jury selection, Plaintiff refused to proceed. The Court granted Defend-

ants' motion to dismiss the action with prejudice for failure to prosecute pursuant to F.R.Civ.P. 41(b).

In his affidavits and briefs supporting this motion to reconsider the dismissal order, Plaintiff dwells mainly on the Court's decision in a related case involving the discharge of a Bloomsburg State College professor, Skehan vs. Board of Trustees of Bloomsburg State College, 358 F.Supp. 430 (M.D. Pa. 1973), a case which has been characterized by both parties as "virtually identical" to this one. Plaintiff contends that the Court's decision in the *Skehan* case was based upon perjured testimony, and that Plaintiff was unable to proceed until he could prove the existence of perjury and thus prevent it in his own case. It is the Court's recollection that at the conferences on February 4 and 5, 1974, Plaintiff stated that his chief reason for not going forward was that the Court's refusal to permit the filing of the amended complaint prohibited him from obtaining complete relief and from protecting the interests of other individuals who allegedly also had been deprived of constitutional rights. Furthermore, the Court stressed the fact that, as far as the Court was concerned, this case was completely separate from *Skehan*, and that this case would receive completely independent consideration.

In his motion for reconsideration, Plaintiff raises several other reasons which he feels justified his refusal to proceed. The Court has reviewed these matters as well as the entire course of this case. In my view, the record indicates that the Court gave special consideration to the Plaintiff because of his pro se status. The Court's insistence, after two previous continuances, that this case be tried was reasonable. There was no other choice but to grant the motion to dismiss when Plaintiff refused to proceed.

NOW, THEREFORE, IT IS ORDERED THAT:

Plaintiff's motion for reconsideration of the February 5, 1974 order dismissing the action with prejudice is denied.

/s/ Muir
MUIR
United States District Judge